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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-282

THE BOARD OF EDUCATION OF
THE CITY OF BESSEMER, ALABAMA, *et al.*,

Petitioners,

v.

DORIS ELAINE BROWN, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported and appears at pages A-1 through A-5 of the Petition; the opinion of the United States District Court for the Northern District of Alabama is also unreported and appears at pages A-6 through A-11 of the petition.

The opinion of the Court of Appeals in *United States* v. *Greenwood Municipal Separate School District*, reprinted at pages A-13 through A-17 of the Petition, is now reported at 460 F.2d 1205.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a school district must furnish transportation to students who are reassigned beyond walking distance as part of a desegregation plan to remedy constitutional violations, rather than being allowed to bring about the failure of the desegregation plan by refusing such transportation and permitting students unable to furnish their own transportation to attend segregated schools.

2. Whether Section 803 of the Education Amendments of 1972, P.L. 92-318, applies to district court orders designed to remedy unlawful segregation and not to achieve racial balance.

Statement

Subsequent to the entry of judgment by the Court of Appeals, the district court held a hearing on August 21, 1972 and entered an order deleting from its prior decree the provision permitting students unable to obtain transportation to their assigned high school to transfer to the other high school. The application for recall and stay of the mandate of the United States Court of Appeals for the Fifth Circuit filed July 18, 1972 was denied by the Court of Appeals on August 17, 1972; no such stay application was ever addressed to a Justice of this Court by petitioners.

Reasons Why the Writ Should be Denied

Pursuant to the order of the district court of August 30, 1971 (which did not require the school district to furnish transportation but allowed pupils unable to reach the high school to which they were assigned under the Court-approved desegregation plan without free transportation to remain at the other high school), 111 black students and 26 white students in the Bessemer school system returned to the schools they had previously attended. Accordingly, during the 1971-72 school year, the high schools remained substantially segregated.

These facts make it clear that the furnishing of pupil transportation by the school system is an essential prerequisite to an effective plan of desegregation as required by *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971). The judgment below is clearly correct and, of course, the identical result was reached by the United States Court of Appeals for the Fourth Circuit in *Brewer* v. *School Board of City of Norfolk*, 456 F.2d 943, *cert. denied*, 406 U.S. 905 (1972). *Accord, United States* v. *Greenwood Municipal Separate School Dist., supra.* There is absolutely no ground whatsoever warranting review of the decision below.*

As to Section 803, we respectfully refer the Court to the construction of the statute by Mr. Justice Powell in *Drummond* v. *Acree*, No. A-250 (September 1, 1972). That correct interpretation of the statute, which is reflected in the actions of other Justices during the Court's summer recess

* Petitioners' attempt to distinguish this case from *Swann* must fail; the Charlotte school system was required by the district court's desegregation order to enlarge its transportation system by adding far more new vehicles and personnel than will be required in Bessemer.

denying stays in desegregation cases, is dispositive of the issue here. Furthermore, since no application to a Justice of this Court for such a stay was made following the denial of a stay by the Court of Appeals, and the plan has now been effectuated *with* free transportation, the issue will be mooted before this Court could render a decision on the merits even were it to grant the writ.

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the Petition be denied.

Respectfully submitted,

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